Probate Court Procedures Involving Persons with Mental Retardation

This pamphlet will answer questions regarding the procedures and responsibilities of the Probate Court with respect to guardianship, sterilization, and involuntary placement of persons with mental retardation. It should be considered as a guide and not as a substitute for competent professional advice.

GUARDIANSHIP OF PERSONS WITH MENTAL RETARDATION

Every person in the State of Connecticut who is 18 years of age or older is considered to be an adult — that is, legally capable of directing his personal and financial affairs. Persons with mental retardation, however, may be totally or partially unable to meet essential requirements for their physical health or safety and/or unable to make informed decisions about matters related to their care. In such cases, the Probate Court is authorized to appoint a guardian to supervise all aspects or certain aspects of the care of an adult with mental retardation. It must be noted that the levels of mental retardation range from mild to profound, and a Court-appointed guardian is **not** necessary for all adults with mental retardation.

Who Can Be a Guardian of an Adult with Mental Retardation?

Any adult person, legally authorized state official, or private nonprofit corporation may be appointed guardian of an adult with mental retardation. Hospitals and nursing homes, however, are not permitted to be appointed such guardians.

An Application/Guardianship of the Mentally Retarded form may be filed by any adult person. The petitioner must allege that the person with mental retardation (referred to as the "respondent") is totally or partially unable to meet essential requirements for his or her physical health and safety and/or is unable to make informed decisions about matters relating to his or her care because of the severity of his or her mental retardation. The application must be filed in the probate court in the district in which the respondent resides or has his or her domicile. There is a $150.00 filing fee to be paid by the petitioner, unless it is waived due to financial need. The application must state:

(1) whether or not the respondent already has a guardian;
(2) the extent of the respondent's deficiencies;
(3) other facts relevant to the application;
(4) those specific areas of protection and assistance required by the respondent if a limited guardianship is sought.

What Notice Is Required?

The law requires that a court hearing be set within 45 days of the filing of the application. The respondent will be personally notified of the time and place of the hearing at least seven days before it is held. The notice must inform the respondent of: the type of guardianship being sought and its legal consequences, the facts described in the application, the specific limitations on the guardian's authority if a limited guardianship is

being sought, and the respondent's right to legal counsel. If the respondent cannot afford to pay for an attorney, one will be appointed without charge. Other interested persons will also be notified of the hearing.

Where Will the Hearing Be Held?

Usually, the hearing is held at the probate court in the district where the respondent resides or has his domicile. The respondent **must** be present at the hearing, however, and the hearing may be held at another site, such as a group home or training school, if that would better insure the respondent's appearance.

What Is Required at the Hearing?

An Assessment Team Evaluation form must be completed by a Department of Mental Retardation (DMR) assessment team in the 45 days preceding the hearing. This three-member team representing appropriate disciplines within DMR will provide the Court with specific information regarding the severity of the respondent's mental retardation and will identify those specific areas, if any, in which he or she requires the supervision and protection of a guardian. If the Court is not satisfied with the report, it may be returned with a request for more specific information. Pursuant to C.G.S.§45a-132a, the Court may order the examination of the respondent by a physician, psychiatrist, or psychologist. The cost of such an examination will be assessed against the petitioner, the respondent, or the party requesting the exam. If the party is unable to pay for the examination, payment will be made by the Probate Court Administration Fund.

At the hearing, the Court will hear evidence concerning the respondent's condition. The DMR assessment team members may be asked to testify. If the petitioner or the respondent's attorney wishes the assessment team members to testify, he or she must make this request at least three days before the hearing. The respondent may also be allowed to participate if his or her condition permits. If the respondent is on medication at the time, the Court should be informed of this fact. The Court may want to hear additional evidence from relatives, friends, social workers, or physicians who can often provide valuable information about the respondent's needs and capabilities.

When Is a Guardian Appointed?

The Court must find by clear and convincing evidence that the respondent is totally or partially unable to meet essential requirements for his or her physical health or safety and totally or partially unable to make informed decisions about matters relating to his or her care. Any alleged inability of the respondent must be evidenced by **recent** behavior that would cause harm or create a risk of harm. Having satisfied these requirements, the Court may appoint:

(1) A **plenary guardian** of an adult with mental retardation. This is a person, legally authorized state official, or private, nonprofit corporation appointed by a Probate Court to supervise all aspects of the care of an adult person who, by reason of the severity of his or her mental retardation, is "**totally** unable to meet essential requirements for his or her physical health or safety" and "**totally** unable to make informed decisions about matters related to his or her care."

OR

(2) A **limited guardian** of an adult with mental retardation. This position is the same in all respects as that of a plenary guardian, **except that** a limited guardian supervises only certain specified aspects of the person's care because the Court finds that he or she is able to do **some**, but not all, of the tasks

necessary to meet essential requirements for his or her physical health or safety, or make **some**, but not all, informed decisions about matters related to his or her care.

The Court must make written findings of fact that support each grant of authority to the guardian. When deciding who shall be appointed plenary or limited guardian, the Court will consider the best interests of the person with mental retardation, including his preference. Frequently, the Court will appoint the individual's closest relative, although it is not required to do so. The plenary or limited guardian must accept her appointment by the Court in writing. A probate bond may also be deemed necessary by the Court for the protection of the person with mental retardation, who is referred to as the "ward" after a guardian is appointed.

Visitation

Any parent of a mentally disabled or mentally retarded adult person for whom a conservator of the person or a guardian has been appointed may file a motion for visitation with the Probate Court that has jurisdiction over the conservatorship or guardianship. After notice and hearing, the Court may grant an order of visitation pursuant to the provisions of C.G.S.§45a-598. The order must contain a schedule specifying the date(s), time(s) and place(s) of visits (including overnight visits, if permitted) and any other conditions that the judge believes to be in the best interest of the ward.

What Are the Powers and Duties of a Plenary or Limited Guardian?

The Probate Court may give a guardian the power to assure and/or consent for:

(1) residence outside the natural family home;
(2) specifically designed educational, vocational, or behavioral programs;
(3) the release of clinical records and photographs;
(4) routine, elective and emergency medical and dental care;
(5) any other specific limited services necessary to develop or regain to the maximum extent possible the ward's capacity to meet essential requirements.

A plenary guardian will be given **all** of the powers set forth above. A limited guardian will be given only those powers deemed necessary by the Court. Plenary and limited guardians also have a duty to assure the care and comfort of the ward within the scope of their appointment and within the limitations of the resources available to the ward, either through his own estate or by reason of private or public assistance. A guardian of a person with mental retardation may also file an application in the probate court to determine a ward's competency to vote in a primary, referendum, or election.

What Are the Limitations on the Authority of a Plenary or Limited Guardian?

Except as permitted by statute, a plenary or limited guardian shall **not** have the power or authority:

(1) to cause the ward to be admitted to any institution for treatment of the mentally ill;
(2) to cause the ward to be admitted to any training school or other facility provided for the care and training of persons with mental retardation if there is a conflict concerning such admission between the guardian and the ward or next of kin;
(3) to consent on behalf of the ward to sterilization, psychosurgery, or to the termination of that person's parental rights;
(4) to consent on behalf of the ward to the performance of any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment, unless it is (A) intended

to preserve the life or prevent serious impairment of the ward's physical health, (B) is intended to assist the ward to regain his or her abilities and has been approved by the Court, or (C) has been (i) approved by a recognized institutional review board, as defined by CFR 46, 21 CFR 50, and 21 CFR 56, as amended, and which is not a part of the Department of Mental Retardation, (ii) endorsed or supported by the Department of Mental Retardation, and (iii) approved for the ward by the ward's primary care physician.

(5) to admit the ward to any residential facility operated by an organization by whom such guardian is employed;

(6) to prohibit the marriage or divorce of the ward;

(7) to consent on behalf of the ward to an abortion or removal of a body organ, unless it is necessary to preserve the life or prevent serious impairment of the physical or mental health of the respondent. Neither an abortion nor the removal of a body organ should ever be authorized without consulting the Court.

What Is a Standby Guardian?

Whenever a Court appoints a plenary or limited guardian, it may also appoint a standby guardian to act if the plenary or limited guardian dies, becomes incapable, or renounces his plenary or limited guardianship. The Court must be informed **immediately** if the standby guardian assumes the guardianship and of the underlying circumstances. The standby guardian will be empowered to assume his duties immediately upon the death or declaration of the incompetence of the plenary or limited guardian.

Once the Guardian Has Been Appointed and Has Accepted the Position, How Does He or She Inform the Court about the Condition of the Ward?

A plenary or limited guardian must submit a report to the Court annually detailing the ward's condition. Additional reports are required when ordered by the Court, if the guardian resigns or is removed, and when the guardianship is terminated. A report must also be filed with the Court if there is a significant change in the ward's capacity to meet essential requirements for her physical health or safety. The reports are to be submitted on a form available at the probate court.

How Are Decisions Made about the Needs and Well-being of the Ward?

Working within the authority granted by the Court, a plenary or limited guardian is the primary decision-maker with respect to the programs needed by the ward and the policies and practices affecting the ward's well-being. To the extent it is appropriate, the ward may also join in the decision-making process. Decisions made about the ward cannot conflict with the requirements of C.G.S.§17a-238, which explains the rights of persons supervised by the Commissioner of Mental Retardation. In making any decisions, the plenary guardian or limited guardian must consult with the ward and appropriate members of the ward's family, where it is possible. A limited guardian shall be the primary decision-maker only with respect to the duties assigned by the Court.

What Happens When a Person with Mental Retardation Changes His Residence?

If an adult with mental retardation for whom a guardian has been appointed becomes a resident of a town in another probate district, the guardian or other interested party may apply for a transfer of that person's file to the new probate district.

How Often Is a Guardianship Reviewed?

At least every three years, the Court must review each plenary or limited guardianship to determine the appropriateness of continuing, modifying, or terminating the guardianship. Not later than 45 days after a request from the Court, the guardian, the ward's attorney, and either a Department of Mental Retardation professional or a three-member DMR assessment team must each submit a written report to the Court about the ward's condition. (Please note: The ward or the Court must make the request for the assessment team.) The DMR professional or the assessment team must personally observe or examine the ward within the 45-day period preceding the date of submission of the report.

In the case of a ward who is functioning within the severe or profound range of mental retardation, as determined by the Department of Mental Retardation, the Court shall receive and review written reports on the ward's condition only from the guardian and the attorney for the ward. However, the Court may require a DMR professional or assessment team to submit a written report on the ward's condition. As noted above, there is a 45-day time limit for submission of a report by a DMR professional or assessment team.

If the Court determines that there has been no change in the status of the ward after a review of the three written reports, a hearing need not be held. However, the Court, in its discretion, may hold a hearing on the ward's status. In addition, the Court must hold a hearing within 30 days if one is requested by the ward's attorney, guardian, or the DMR professional or Assessment Team. No order expanding or reducing the powers or responsibilities of the guardian may be issued unless a hearing is held. If the ward is unable to request or obtain an attorney, the Court will appoint one. Compensation for the attorney's services will be paid by the Probate Court Administration Fund if the ward cannot afford to pay for counsel.

Can a Guardian Be Removed after Appointment?

Yes. The determining factor is the best interest of the ward. Upon proper application, notice, and hearing, the Court may remove the present guardian and appoint a new one.

How Are Conflicts to Be Resolved?

Conflicts between the plenary guardian, limited guardian, conservator of the estate or person, and/or temporary conservator are to be resolved by the Probate Court.

How Is a Temporary Limited Guardian Appointed?

Any interested party may file an Application for Temporary Limited Guardianship alleging that an adult with mental retardation is in need of elective surgical, medical, or dental procedures or treatment involving the use of general anesthesia, and that by reason of the severity of his mental retardation, he or she is unable to give informed consent to such treatment. The application must include two certificates, one signed by a physician licensed to practice medicine or surgery in Connecticut and one signed by a licensed psychologist. The certificates must state that each doctor has examined the respondent within 30 days of the filing of the application, and in their opinion:

(1) the respondent's condition renders him or her incapable of giving informed consent to the procedure, **and**

(2) without such treatment, the respondent will suffer deterioration of his or her physical or mental health or serious discomfort.

Upon application and notice to the respondent, his parents or spouse, if any, and to the Office of Protection and Advocacy, a hearing will be held promptly. If the Court finds it necessary, a temporary limited guardian will then be appointed for the purpose of consenting to such procedure and/or treatment. In making the appointment, the Court will give preference to the parent, next of kin, or other person whom the Court deems proper. If it is unable to find a suitable guardian, the Court may appoint the Commissioner of Mental Retardation or his designee to serve in such capacity. The appointment shall be valid for no more than 60 days. A temporary limited guardian will be subject to the same limitations on authority that apply to limited guardians.

Is a Guardian Immune from Civil Liability?

Any plenary, limited, or temporary limited guardian of an adult with mental retardation who acts in good faith or under order of a Probate Court will be immune from civil liability, except in the case of gross negligence.

Can the Court Appoint a Conservator of the Estate for a Person with Mental Retardation?

Yes. In addition to a guardian of the person, an adult with mental retardation may require a conservator of the estate to oversee her financial affairs if he or she owns property and/or has assets and is unable to properly manage them. The conservator may be a person, municipal or state official, or a private or nonprofit corporation (with the exception of a hospital or nursing home). Although the Court will consider the preference of the adult with mental retardation when appointing a conservator, the final determining factor will be his best interest. For further information about conservatorship, a pamphlet entitled *Guidelines for Conservators* is available at the probate court.

STERILIZATION

What Is the Law in General?

Sterilization is defined in the Connecticut General Statutes as "a surgical or other medical procedure the purpose of which is to render an individual permanently incapable of procreating." In Connecticut, sterilization, because of its serious consequences, is available only to persons who have attained the age of 18 and have given written informed consent. Our state laws provide many safeguards designed to protect the interests of those persons who may not be able to give informed consent. Such persons include those with mental retardation and those under conservatorship or guardianship.

What Is Informed Consent?

The Connecticut General Statutes are clear about what constitutes informed consent. For the purposes of sterilization, "informed consent" means consent that is:

(1) based upon an understanding of the nature and consequences of sterilization;
(2) given by a person competent to make such a decision;
(3) wholly voluntary and free from coercion.

If a physician has reason to believe that a person age 18 or over is unable to give informed consent, or if the person resides in a state institution, a sterilization procedure may not be performed unless the Probate Court has

determined that the person is able to give informed consent and has done so. If the Court finds that the individual has not given such consent or is under guardianship or conservatorship, the Court may authorize sterilization only if it finds that it is in such person's best interest.

How Does the Probate Court Determine If Sterilization Is in a Person's Best Interest?

At a hearing held after proper application and notice, the Court will consider medical, social, educational, residential, and psychological evidence to determine if the procedure will be in the person's best interest. Such a determination must include all of the following factors:

(1) whether less drastic alternative contraceptive methods have proved workable or inapplicable;
(2) whether the individual is physiologically sexually mature.
(3) any evidence of infertility;
(4) whether the individual has the capability and a reasonable opportunity for sexual activity;
(5) the individual's inability to understand reproduction or contraception and the likelihood of permanence of that inability;
(6) the physical or emotional inability to care for a child;
(7) whether the proponents of the sterilization are seeking the sterilization in good faith such that their primary concern is for the best interests of the respondent rather than for their convenience or that of the public;
(8) if, in the case of females, procreation would endanger the life or severely impair the health of the individual.

Refusal to undergo sterilization is allowed despite the Court's findings, if the Court determines that an individual fully understands the nature and consequences of such refusal.

A hysterectomy may not be performed simply for the purpose of sterilization. If, however, a surgical procedure that **may result** in sterilization is medically indicated, it may be performed.

Opportunity to Appeal Decree Permitting Sterilization

As required by law, the Probate Court’s decree permitting sterilization shall be stayed for a period of not less than 10 days from the date of the decree in order to give the respondent the opportunity to file an appeal. If an appeal is not filed within the time period, the stay shall be lifted, and the decree will take effect. However, if an appeal is filed within the time period, the stay of the decree will remain in effect pending the outcome of the appeal. Please note that a decree permitting sterilization cannot be stayed if the Court finds that the respondent (1) is 18 years of age or older, (2) is able to give informed consent to a sterilization procedure, and (3) has given informed consent, in writing, to the sterilization procedure.

INVOLUNTARY PLACEMENT

Under What Circumstances Can a Person with Mental Retardation Be Involuntarily Placed in a

State Facility by the Department of Mental Retardation?

The Probate Court has the power to place a person with mental retardation with the Department of Mental Retardation provided that certain conditions are met. The Court must find by clear and convincing evidence that the person is mentally retarded AND (1) is unable to provide himself with at least one of the following: education, self-development, care for his for personal and mental health needs, food, shelter, clothing and/or protection from harm; (2) has no family or guardian to care for him or his family or guardian can no longer provide adequate care; 3) is unable to obtain essential services in the absence of placement; and (4) is unwilling to submit to placement with DMR or he (or his next of kin) has opposed voluntary admission sought by a guardian. The placement must be in an appropriate setting that meets the developmental needs of the person with mental retardation in the least restrictive environment available or that can be created within the department's existing resources.

PROBATE APPEALS

Any person aggrieved by an order, denial, or decree of the probate court may appeal to the Superior Court. In general, appeals must be taken within 30 days from the date of the order, denial, or decree.

CONCLUSION

Safeguarding the rights of persons with mental retardation is of paramount importance when guardianship, sterilization, or involuntary placement is contemplated. An adult person with mental retardation, while of the age of full legal rights, may be unable to act for himself or herself in many circumstances. A guardian, stepping in to act on behalf of a person with mental retardation, will undertake serious responsibilities and should always seek competent professional advice when making decisions that will affect the person with mental retardation.

PROBATE COURT FORMS

Guardianship of the Mentally Retarded

Application/Guardianship of Mentally Retarded PC-700
Application/Placement of Mentally Retarded PC-701
Application/Sterilization of Adult PC-702
Assessment Team Evaluation: Guardianship of the Mentally Retarded PC-770
DMR Professional or Assessment Team Evaluation: Guardianship of the Mentally Retarded/Review Hearing PC-770A
Guardian's Report/Guardianship of Mentally Retarded PC-771
Psychologist's Report/Placement of Mentally Retarded PC-772
Panel Evaluation/Sterilization of Adult PC-773

These forms are available at the probate court. Forms concerning temporary limited guardianship and the return/request form for the DMR professional or assessment team evaluation must be reproduced from the *Probate Clerk's Manual*.